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BellSouth Corporation

April 4, 1997

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )

Implementation of the )  
Telecommunications Act of 1996 )

Telemessaging, )  
Electronic Publishing, and )  
Alarm Monitoring Services )

CC Docket No. 96-152

BELLSOUTH FURTHER COMMENTS

BELLSOUTH CORPORATION

By Its Attorneys

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## SUMMARY

In these Comments, BellSouth responds to the Commission's request for input on appropriate definitions of "control" and "financial interest" for purposes of determining whether a BOC is engaged in electronic publishing.

"Control" should not be defined in a way that would cause activities permitted as part of the operation of a gateway to be deemed to be control of the information accessible through the gateway. Access control functions of a gateway must be distinguished from the control of content that is characteristic of electronic publishers. Thus, control of information must be defined in terms of the exercise of editorial discretion to determine the fundamental package of information that will be presented to a user by the actual publisher of that information, rather than the mere facilitation of a user's access to their desired provider of information.

"Financial interest" should be defined in terms of an interest in an electronic publishing service rather than an interest in the "content of information." Such an approach is consistent with that recently adopted for assessing whether a BOC is providing alarm monitoring service. Thus, a gateway provider may be compensated for its own performance in adding value to an information provider's offering by structuring links on the gateway without obtaining any "financial stake" in the information provider's service. Such links and other presentation devices do not constitute control over the content provided by the information source to which the gateway links, and do not constitute electronic publishing on the part of the gateway provider.

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**BELLSOUTH FURTHER COMMENTS**

BellSouth Corporation, for itself and on behalf of its affiliated companies ("BellSouth"), hereby responds to the Commission's *Further Notice of Proposed Rulemaking*<sup>1</sup> in the above captioned proceeding.

Section 274<sup>2</sup> of the Communications Act<sup>3</sup> imposes certain limitations on Bell operating companies' and their affiliates' provision of electronic publishing services. In the *Report and Order*, the Commission properly parsed through the statutory definitions and other provisions to conclude that

to be engaged in the provision of electronic publishing services  
subject to section 274, the BOC must disseminate the  
information via its basic telephone service (as defined by

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<sup>1</sup> *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-35 (rel. Feb. 7, 1997) (cited herein as "*First Report and Order*" or "*Further Notice*," as appropriate).

<sup>2</sup> 47 U.S.C. § 274.

<sup>3</sup> 47 U.S.C. §§ 151 *et seq.*

274(i)(2)) *and* have control of, or a financial interest in, the content of the information being provided.<sup>4</sup>

The Commission determined, however, that notwithstanding the statutory support for this conclusion, there was little information in the record to help define the meaning of the “control or financial interest” test.<sup>5</sup> Accordingly, the Commission deferred to the *Further Notice* the question of the “exact meaning” of “control” and “financial interest.”<sup>6</sup> BellSouth responds to that inquiry in these Comments.

### **Meaning of “Control”**

First, BellSouth concurs in the Commission’s initial assessment that “control” as normally defined and used in the context of corporate structures and affiliations provides an inappropriate model for determining the meaning of “control” in the present context.<sup>7</sup>

BellSouth also does not believe that “control” should be defined in terms of a quantified “ownership interest” in the content of the information transmitted via a BOC’s basic telephone service.<sup>8</sup> Any test based on the BOC’s “percentage of ownership” in the content of any given quantum of information would be impossible to administer.

Control also should not be defined in a way that would cause activities permitted as part of the operation of a gateway to be deemed “control” of the information accessible through the

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<sup>4</sup> *Report and Order* at ¶ 56 (emphasis added). *See also, id.* at ¶ 49 (“[W]e conclude . . . that a BOC must control, or have a financial interest in, the content of the information transmitted over its basic telephone service in order to be subject to the requirements of section 274.”).

<sup>5</sup> *Report and Order* at ¶ 49.

<sup>6</sup> *Report and Order* at ¶ 49; *Further Notice* at ¶¶ 242-46.

<sup>7</sup> *Further Notice* at ¶ 243.

<sup>8</sup> *Further Notice* at ¶ 243.

gateway. For example, an internet access or gateway provider's offering of a functionality that, at the subscriber's direction, limits individual users' access to certain types of information that otherwise might be accessible to those users should not be considered control of the content of the information itself. Rather, such access control functions of a gateway must be distinguished from the content control that is a characteristic of electronic publishing.

Indeed, control of information should be defined in terms of the exercise of editorial discretion to determine the fundamental package of information that will be presented to a user by the actual publisher of that information, rather than the mere facilitation of a user's access to a desired provider of information. Thus, on-line services and information services providers such as America On Line, CompuServe, on-line newspapers, etc., that exercise such editorial control over the actual compilations and presentation of chosen information resources, do exercise control over the content of information and are engaged in electronic publishing. In contrast, internet access and related gateway services that merely provide users access to the myriad of information sources available on the Internet through conveniently organized gateways, search engines, or other navigational aides that help users understand what sources of information may be of interest or relevant to their needs, do not exercise such editorial control over the accessible information being provided by other parties and therefore are not engaged in electronic publishing.<sup>9</sup>

There are literally millions of sites and information sources accessible on the World Wide Web and other portions of the Internet. A gateway service, if it is to be meaningful and useful to

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<sup>9</sup> Of course, to the extent an on-line service provider like America On Line or CompuServe also offers web access, they are not exercising editorial control at that point and are not engaged in electronic publishing for that activity.

the end users, obviously cannot simply list all possible sites; it must be selective in how it culls, organizes, and displays links to those sites.

Indeed, it is the inherent right of the gateway provider, as well as a practical and commercial necessity, to determine which information sources will be featured on its gateway and which will not. Control over what information sources will be linked to by the gateway, and how those links will appear on the gateway, are functions essential to the operation of the gateway. These functions do not constitute control over the content provided by the information source to which the gateway links, and they do not constitute electronic publishing on the part of the gateway provider.

#### **Meaning of “Financial Interest”**

The Commission tentatively concludes that a BOC has a “financial interest” in the content of information when the BOC “owns the information” or has a “direct or indirect equity interest” in the information being disseminated via the BOC’s basic telephone services.<sup>10</sup> To BellSouth, this proposal seems to be little more than a circular definition. Neither of these measures suggests what would be appropriate indicia of “ownership” or of an “equity interest,” leaving the meaning of “financial interest” as elusive as before. Moreover, as with the definition of “control,” BellSouth believes any attempt to quantify the degree of a BOC’s “financial interest” in something so amorphous as the “content of information” would be impossible to administer.

Instead, BellSouth believes the Commission’s alternative, albeit seemingly unintentional, suggestion for defining “financial interest” is more appropriate. That is, while inquiring whether it should consider a *de minimus* exception for a small financial interest in the content of information,

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<sup>10</sup> *Further Notice* at ¶ 245.

the Commission apparently inadvertently referred to the “percentage of financial interest in an electronic publishing *service*.”<sup>11</sup> BellSouth believes that the degree of a BOC’s financial interest in an electronic publishing service is a more workable metric for determining whether a BOC is engaged in electronic publishing.

Moreover, such a test is conceptually similar to that recently adopted in the Commission’s *Second Report and Order*<sup>12</sup> in this proceeding. There, for example, the Commission indicated it would consider whether a BOC has a “financial stake in the commercial success” of an alarm monitoring provider in determining whether the BOC should be deemed to be engaged in the provision of such service.<sup>13</sup> In contrast, compensation to a BOC based simply on the BOC’s own performance in marketing an unaffiliated firm’s alarm service presumably would not constitute provision of the service.<sup>14</sup>

A similar test could be applied in the context of electronic publishing services. For example, under this test, a BOC that receives compensation from an unaffiliated entity for making the content of the nonaffiliate more readily accessible as part of the BOC’s gateway service would not be considered to have a “financial interest” or “financial stake” in the commercial success of the nonaffiliate, but would merely be receiving compensation tied to its own performance.<sup>15</sup>

It is also an inherent right of the gateway provider to determine the size and organizational

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<sup>11</sup> *Further Notice* at ¶ 246 (emphasis added).

<sup>12</sup> *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, *Second Report and Order*, FCC 97-101 (rel. March 25, 1997).

<sup>13</sup> *Second Report and Order* at ¶ 39.

<sup>14</sup> *Id.*

<sup>15</sup> *Further Notice* at ¶ 245 (referring to NYNEX position in prior comments).



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structure or categorization of its gateway (and thus the amount of space available on the gateway for links to other parties' information services), and to ration or allocate such space on whatever business or economic terms the parties deem appropriate. The appearance of a link on an effective, useful, and popular gateway has value to the information provider who appears on the gateway, and the gateway provider has a right to capture some or all of that value through any number of fee structures or other mechanisms. Such mechanisms, based on the value of the gateway link, regardless of their form, cannot reasonably be construed to constitute the holding by the gateway provider of a financial interest of any kind in the other party's information or electronic publishing service.

### CONCLUSION

BellSouth urges the Commission to define "control" and "financial interest" in accordance with the foregoing discussion. Applying such definitions will lead to results consistent with the statutory exclusion of gateway services from the definition of electronic publishing.<sup>16</sup>

Respectfully submitted,

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<sup>16</sup> 47 U.S.C. § 274(h)(1), (h)(2).

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 4th day of April, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH FURTHER COMMENTS by hand delivering a true and correct copy of the same addressed to the parties below:

  
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